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SUMMARY

The Florida Cities strongly urge the Commission to deny CTIA's Petition requesting interpretation of provisions of Section 332(c)(7) of the Communications Act to impose time frames that are in direct conflict with the Congress' clear and expressed intent. The Commission's authority to interpret language in the Communications Act is limited to areas of ambiguity. The language of Section 332(c)(7) indicates a clear and unambiguous Congressional intent.

In enacting Section 332(c)(7)(B)(ii), Congress expressly recognized the reality that wireless siting projects vary in size and complexity, and time requirements vary based on the nature and scope of the request. Section 332(c)(7)(B)(ii) requires a state or local government to act on a request for placement, construction, or modification of wireless service facilities within a reasonable period of time after the request is filed taking into account the nature and scope of such request. If the Legislature intended to impose specific time frames for processing wireless siting facility applications, it would have done so. Therefore, the Commission has no legal authority to issue rules or guidelines to implement Section 332(c)(7)(B).

The Commission should deny CTIA's request that an automatic approval is granted if a local government fails to act within their proposed time frames. Such unwarranted action would place the interests of communications providers above the interests of the residents and the local communities that the wireless providers serve. The Communications Act already provides a remedy for wireless providers that believe they were adversely affected by a local government action, or lack thereof. Thus, if a state or local government acts or fails to act on a wireless siting application, the affected applicant may appeal the final denial decision or failure to act to a court of competent jurisdiction. Further, Florida law provides standards that local governments must apply to wireless providers in regulating the placement, construction or modification of wireless facilities that balances competition and timely processing of siting applications with the need to protect the interests of the residents and local governments. The Florida Cities have adopted wireless ordinances that incorporate laws that foster a competitive environment.

Finally, the Commission should deny CTIA's request that the Commission preempt state and local laws regarding wireless facility siting. CTIA's request completely ignores the language in the Communications Act that specifically preserves local zoning authority. State and local governments have the authority to protect their residents and communities by ensuring, through local legislation and the application process, that the least intrusive siting decisions are made that respect public safety concerns, the character of the community, property values, and the crucial tourism and real estate markets. Earlier this month, the Ninth Circuit acknowledged such concerns and rejected a wireless provider's claim that a local government's wireless ordinance effectively prohibited the provision of wireless services, and recognized that the Communications Act already provides an expedited judicial review process in state or federal court.

Therefore, CTIA's request to preempt local and state authority over wireless siting would diminish local zoning authority, and, consequently, jeopardizes public safety and the character of neighborhoods within the Florida Cities.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Petition for Declaratory Ruling to Clarify	)	
Provisions of Section 332(c)(7)(B) to Ensure	)	MB Docket No. 08-165
Timely Siting Review and to Preempt under	)	
Section 253 State and Local Ordinances that	)	
Classify All Wireless Siting Proposals as	)	
Requiring a Variance		

COMMENTS SUBMITTED BY CERTAIN FLORIDA MUNICIPALITIES

Introduction

These Comments are filed on behalf of the following Florida municipalities: Village of Bal Harbour, Town of Bay Harbor Islands, Town of Cutler Bay, City of Hollywood, City of Homestead, City of Miramar, City of Sunrise, and the City of Weston (hereinafter referred to collectively as "Florida Cities") to urge the Federal Communications Commission ("Commission") to deny the July 11, 2008, Petition for Declaratory Ruling filed by CTIA-The Wireless Association ("CTIA")[1]. CTIA's Petition is without merit and without basis in law or fact.

While the Florida Cities in many respects are very diverse and range greatly in size, they share a number of common practices and procedures. First, they welcome and encourage competition in wireless services and have approved numerous wireless applications from

[1] In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Petition for Declaratory Ruling*, WT Docket No. 08-165, filed July 11, 2008; hereinafter citied as "Petition").

multiple wireless providers. Second, the Florida Cities must comply with Florida law, which sets forth specific requirements local governments must follow when reviewing and approving a wireless siting application. Third, they have all experienced severe hurricanes and must have appropriate authority over wireless facility placement to effectively prepare for and respond to severe weather events. Finally, the Florida Cities remain committed to maintaining local authority to protect the interests of residents and the communities they live in.

As a preliminary matter, the Florida Cities agree with and therefore adopt the comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA") in this proceeding. The Florida Cities firmly believe that the Commission would be acting inappropriately, both from legal and policy standpoints, if it interferes with local zoning authority.

I. THE COMMISSION SHOULD NOT ALTER THE TIME PERIODS ESTABLISHED BY THE LEGISLATURE FOR WIRELESS SITING REQUESTS.

A. The Statutory Language "Failure To Act" is Clear.

The Commission should deny CTIA's Petition requesting that the Commission should supply meaning to the phrase "failure to act." The Commission's authority to interpret language in the Communications Act of 1934, as amended, (the "Communications Act") is limited to areas of ambiguity. "Failure to act" is not an ambiguous phrase. The word "failure" means the "omission of an occurrence or performance;" [2] the word "act" means "the process of doing or performing"[3] Taken together, the phrase "failure to act" means to omit the performance of an activity. There is nothing vague or ambiguous about this statutory language which would entitle the Commission to issue a declaratory ruling on this topic.

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[2] Merriam-Webster Dictionary
[3] Black's Law Dictionary, 7th

Federal agencies only have authority to issue rules or guidelines pursuant to a federal statute if the statute itself provides for the creation of such rules, or if the statute is unclear or ambiguous and requires guidance and interpretation from the agency. There is no statutory mandate requiring the Commission to issue rules regarding the "failure to act" provision in 47 U.S.C. §332(c)(7)(B)(v). The provision is clear and unambiguous. There is no gap in the statute to give it the full meaning that Congress intended. When Congress has directly spoken to a precise question at issue, and the intent of Congress is clear, agencies must give effect to the unambiguously expressed intent of Congress. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). The Commission's discretion in interpreting Section 332(c)(7)(B)(v)'s "failure to act" clause, therefore, is limited by the expressed terms of the statute. Only if there are ambiguities in those provisions may the Commission substitute its own judgment for that of the Congress. Accordingly, the Commission has no legal authority to issue rules or guidelines to implement Section 332(c)(7)(B).

The statutory language of Section 332(c)(7)(B) is so plain as to foreclose CTIA's request that the Commission create additional guidelines and rules for wireless providers. The "failure to act" language of Section 332(c)(7)(B) shows a clear and unambiguous Congressional intent. When Congress adopted Section 332(c)(7)(B)(ii), it expressly recognized that the time frame for responding to applications for wireless facility sitings is determined by reference to the nature of the application. The judiciary, and not an agency, is the final authority on issues of statutory construction and courts reject administrative constructions which are contrary to clear congressional intent. See, e.g., FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981); SEC v. Sloan, 436 U.S. 103, 117-18 (1978); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745-46 (1973); Volkswagenwerk v. FMC, 390 U.S. 261, 272 (1968); NLRB v. Brown,

380 U.S. 278, 291 (1965); FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965); Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946); Burnet v. Chicago Portrait Co., 285 U.S. 1, 16 (1932); Webster v. Luther, 163 U.S. 331, 342 (1896).

The "power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[4] Chevron at 843-44; Morton v. Ruiz, 415 U.S. 199, 231 (1974). Courts have held that if Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Chevron at 843-44. However, the "failure to act" language of Section 332(c)(7)(B)(v) leaves no such gap for the agency to fill. To the contrary, when it adopted Section 332(c)(7)(B), Congress explicitly provided that "that if a person is adversely affected by any final action or failure to act by a State or local government, the person may commence an action in any court of competent jurisdiction".

Accordingly, it is clear from Section 332(c)(7)(B) that the Commission should not supply meaning to the phrase "failure to act," for a local government to follow when considering approval of a wireless siting application.

B. CTIA's Reliance On 47 U.S.C. §253 Is Misplaced.

47 U.S.C. §332(c)(7)(B) governs wireless tower sitings to the exclusion of §253. CTIA's argument that 47 U.S.C. §253 applies to wireless tower sitings is misplaced. §253 addresses telecommunications generally, while the language in §332(c)(7)(B) is specific to wireless service facilities. §332(c)(7)(B)(i) provides:

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof –

[4]*Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984)

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

The Supreme Court's ruling in Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-385 (1992), establishes that specific code sections supersede general code sections. §253 provides that no local government may prohibit or effectively prohibit the provision of telecommunications services. 47 U.S.C. §332 is very specific as to the remedies and procedures to be followed with respect to wireless facility applications. Congress specifically addressed wireless facility siting in §332(c)(7). The specificity of these remedies shows that §332(c)(7) applies to wireless service facilities to the exclusion of §253.

C. Congress Enacted a Reasonableness Standard that Considers the Nature and Scope of a Wireless Siting Application.

Under the Communications Act, Congress made it perfectly clear that the time frame for responding to applications for wireless facility sitings is determined by reference to the nature of the application. The local government shall act "within a reasonable period of time after the request is duly filed with such government ... taking into account the nature and scope of such request."[5] Section 332(c)(7) of the Communications Act recognizes the reality that siting projects vary in size and complexity, and time requirements vary based on the nature and scope of the request. If the Legislature intended to impose specific time frames for wireless applications, it would have done so. The proposed deadlines in CTIA's Petition ignore the time needed to resolve complex and contentious cases, such as towers in residential areas affecting property values and local character, and delays caused by the wireless providers. Even if ambiguity existed in the statute, which it does not, the Commission would be acting outside its authority by

[5] *Id.*

mandating a fixed time period and imposing a remedy for violating such an unfunded, Commission imposed mandate, where Congress clearly intended fluidity.

D. The Existing Federal Law Is Sufficient For Relief

Under 47 U.S.C. §332(c)(7)(B)(v), wireless providers are provided a forum to address the concerns raised in CTIA's Petition for Declaratory Ruling. The Communications Act provides that "any person adversely affected by a local government's final action or failure to act may, within thirty (30) days, file suit in any court of competent jurisdiction".[6] Thus, if a local government acts or "fails to act" on a wireless siting application, the affected applicant may appeal the final denial decision or "failure to act" to a court of competent jurisdiction."[7] Additionally, any person adversely affected by local government wireless siting regulation "on the basis of the environmental effects of radio frequency emissions"[8] may petition the Commission for relief.[9] The Federal courts have recognized that the Communications Act creates "a comprehensive remedial scheme that furnishes private judicial remedies" for zoning requests wrongfully denied.[10] Moreover, the Communications Act provides that "the court shall hear and decide such action on an expedited basis,"[11] which demonstrates that ample relief is provided for the wireless industry.

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[6] 47 U.S.C. §332(c)(7)(B)(v)
[7] 47 U.S.C.§332(c)(7)(B)(v)
[8] 47 U.S.C.§332(c)(7)(B)(iv)
[9] 47 U.S.C.§332(c)(7)(B)(v)
[10] *Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687, 694 (3d Cir. 2002).
[11] 47 U.S.C.§332(c)(7)(B)(v)

II. THE COMMISSION SHOULD NOT ALTER STATE AND LOCAL WIRELESS SITING LAWS.

A. Florida Law Provides Regulations For Wireless Siting Applications.

Florida Law, effective July 1, 2005, provides standards that local governments must apply to wireless providers in regulating the placement, construction, or modification of wireless communications facilities including, but not limited to, the application process and what a local government can and can not require from a wireless provider; the time frames for processing a wireless siting application; fees a local government may charge; and the application of the local governments' substantive development standards and zoning requirements for new towers and for collocations of antennas.[12] Florida Law also encourages collocation among wireless providers by making the collocation of wireless facilities on an existing structure exempt from land development regulations pursuant to §163.3203, F.S., provided that the height of the structure does not increase. Florida law sets forth the procedures for local governments and wireless providers to follow regarding submission of applications and notification of deficiencies in applications. Similar to existing Federal law, it provides time limits local governments must follow in granting or denying properly completed applications. The law also limits restrictions on setback distances, placement in residential areas, fees, and structural or construction standards that local governments may impose upon wireless providers.

There has been no showing of unnecessary and excessive requirements with cell tower zoning in the Florida Cities. Local governments have experienced just as much frustration as many in the industry when the issue of timing arises regarding wireless siting negotiations.

[12] §365.172(12)(a), Florida Statutes

B. The Existing Florida Time Frames Are Sufficient For Relief.

Florida Law properly balances the promotion of effective competition and the timely processing of siting applications with the need to protect the interests of the residents, the community and the local government. CTIA's proposed deadlines ignore state and local laws on approval of wireless siting applications that have been developed and refined by citizen elected local representatives to protect the best interests of residents and communities. CTIA's proposed deadlines are unnecessary, unrealistic and burdensome to local governments.

Florida Law requires local governments to notify applicants within twenty (20) business days as to whether or not the application was properly submitted,[13] and provides that such notification "shall indicate with specificity any deficiencies...which, if cured, shall make the application properly completed."[14] Although CTIA proposes certain "shot clock" time frames for application approval, Florida Law already requires a local government to grant or deny a properly completed application for the collocation of wireless facilities within forty-five (45) business days, provided that the application complies with local zoning ordinances, land and building regulations, and aesthetic requirements.[15] Local governments must grant or deny each properly completed application for any other wireless communications facilities based on the application's compliance with the local government's applicable regulations, including but not limited to land development regulations, within the normal time frame for a similar building permit review but no later than ninety (90) business days after the application is determined to be properly completed.

The CTIA proposes an automatic approval if a local government fails to act within their proposed time frames. However, under Florida law, properly completed applications that are not

[13] §365.172(12)(d)(3)(a), Florida Statutes
[14] *Id.*
[15] *Id.*

timely granted or denied are deemed automatically approved, but provide for an extension to the next regularly scheduled meeting if local government procedures require action by its governing body.[16] Florida Law also provides for the waiver of a timeframe to be effective, provided that by the applicant and the local government voluntarily agree to the waiver.

While wireless service providers claim that local governments are the cause for delays, the Florida Cities have been equally as frustrated by the industry's failure to pursue negotiations in a timely and efficient manner not to mention the actual time it takes to construct the wireless facility. Just as the industry calls upon local governments to be under some time constraint for processing a wireless siting application, which the Florida Cities have, so too should the industry be held to reasonable time frames for providing the information necessary to make an informed decision and a proper response to requests. Additionally, many of the delays in the Florida Cities are caused by site acquisition companies that submit wireless siting applications to a municipality and their attempts to negotiate a site lease agreement without having legitimate authority from the wireless companies they represent. The Florida Cities may be willing to support timeframes within which *all* parties should act, whether it is for processing an initial wireless siting application, or removal of abandoned tower or antennas. However, the Florida Cities maintain that any timeframes established must respect the fundamentals principles of public notice and due process, and must take into consideration the Florida Cities obligations under Florida and local law to follow certain procedures to ensure that residents are informed and have an opportunity to provide input. No community should be forced to make a determination without permitting their citizens the opportunity to voice their concerns if that is the process that the government has put into place for such matters.

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[16] *Id.*

The Florida Cities would like the Commission to review and evaluate existing Florida Law, which already provides the standards that local governments must apply to wireless providers in regulating the placement, construction, or modification of wireless communications facilities.[17] Similar to existing Federal law, Florida law provides time limits local governments must follow in granting or denying properly completed applications. CTIA's Petition states that local regulations and state laws subject wireless siting applicants to allegedly unique, burdensome requirements. However, the content of state laws, such as Florida, and local laws such as those enacted by the Florida Cities reflect reasonable time conditions and equitable procedures that are necessary to promote competition and protect the rights of their residents and the character of their communities.

C. Notice And Hearing Requirements For Facility Siting.

Florida law requires proper notice and public hearings to ensure that the rights of the applicant and the public are preserved. These requirements are found in §365.172 and §166.041, Florida Statutes. Florida requires a proposed ordinance to "be read by title, or in full, on at least 2 separate days and shall, at least 10 days prior to adoption, be noticed once in a newspaper of general circulation in the municipality."[18] To comply with these Florida public notice requirements, Florida Cities must properly schedule two readings of an Ordinance approving a site lease agreement between a provider and a municipality at two separate meetings before the public. Accordingly, CTIA's proposed deadlines ignore the Florida Cities' obligations to: (1) notify residents within the affected areas of a wireless siting; (2) provide official notice of public

[17] §365.172(12)(a)-(g), Florida Statutes
[18] *Id.*

meetings;[19] and (3) coordinate the proper application review with the scheduling responsibilities of the local governing authority.

D. Number of Applications and Outcomes.

During the past five (5) years, the City of Miramar has reviewed eleven (11) wireless siting applications, and, consequently, entered into eleven (11) site lease agreements with five (5) different wireless providers, including Verizon, Sprint, Nextel, T-Mobile and MetroPCS. Additionally, the cities of Hollywood, Homestead and Miramar all have water towers within their jurisdictional boundaries. The City of Miramar has one water tank that Sprint/Nextel, Verizon, T-Mobile and AT&T Wireless have collocated on. The City of Hollywood has two water towers that Sprint/Nextel and T-Mobile have collocated on. The City of Homestead has two water towers that Sprint/Nextel, Verizon Wireless, MetroPCS and AT&T Wireless of Florida have collocated on. In 2005, the City of Weston approved placement of a monopole tower on City-owned property that now houses five collocators. Wireless competition is prevalent as indicated by the small example of the number of providers that placed facilities within the Florida Cities.

E. Florida Cities Local Legislative Contents.

Many of the Florida Cities have adopted specific provisions to address major concerns that have arisen in their communities regarding placement of wireless facilities. Local governments are the most appropriate regulatory entities to ensure that wireless facilities do not interfere with the local and regional comprehensive plans. Moreover, there are hurricanes, thunderstorms, windstorms, floods, tornadoes and other natural disasters in Florida that impact the siting of wireless facilities. It is important that the Florida Cities be responsible for regulating

[19] §166.041(3)(a), Florida Statutes

placement of wireless facilities within their respective jurisdictions for the safety and general welfare of their residents.

To assist the Commission in its evaluation of local siting requirements, below are details specific to the wireless facilities siting process and experiences in the Florida Cities. On June 20, 2007, the Town of Cutler Bay, which was incorporated in 2006, adopted the Town's Wireless Telecommunications Facilities Ordinance ("Wireless Ordinance")[20], in compliance with state law, to establish guidelines for the siting of telecommunication towers, antennas and equipment cabinets in the Town and to minimize their potential adverse impacts on the community. The following are the major elements of the Wireless Ordinance:

- **Definitions** - The Wireless Ordinance contains definitions to maintain consistency with current law and technology. The definitions include terms that provide enhanced understanding of the technology, construction, and public safety involved in the telecommunications industry.

- **Application Requirements** – The Wireless Ordinance sets forth an application process for the construction, installation, or placement of any wireless communications facilities, including towers, antennas and equipment shelters within the Town enhances the ability of the providers of wireless communications services to provide such services to the community through an efficient and timely application process. Such application requirements include, but are not limited to, lot size, inventory of existing sites, engineering report, and certification that the proposed facility will not interfere with public safety communications.

- **Review Process** – The Town's Director of Development Services is responsible for reviewing applications for consistency with the Town's land development regulations and compatibility of the proposed tower or antenna with the surrounding neighborhood. Upon review, the Director of Development Services must issue a recommendation to the Town Council. The Council considers such recommendation as well as additional factors presented by the applicant or Town staff. The Council has the authority to approve of deny any application that incorporates the factual basis for the Council's decision.

- **Development Standards** – The Wireless Ordinance sets forth the placement and size restrictions for towers, antennas mounted on towers, structures or rooftops, utility or light poles, and equipment cabinets. The Wireless Ordinance also provides collocation incentives; hierarchy of siting alternatives and preferred zoning districts; public safety communications interference standards; and aesthetics to limit adverse impact on adjacent properties.

[20] Ordinance No. 07-17, Town of Cutler Bay, Enacted June 20th, 2007

- **Removal of Abandoned Towers and Antennas** – The Wireless Ordinance attempts to minimize potential damage to property from towers and antennas by requiring any antenna or tower that is not operated for a continuous period of twelve (12) months to be considered abandoned. If an owner fails to remove any and all equipment, the Town may remove the equipment at the owner's expense.

- **Protection of the Town and Residents Interests** –. The Wireless Ordinance requires applicants to maintain insurance, indemnify the Town and establish a security fund to secure the payment of removing an antenna or tower that has be determined to be abandoned or is not in compliance with the Wireless Ordinance.

The Wireless Ordinance ensures that the best interests of the taxpayers and the local governments that serve them are properly protected. The Florida Cities maintain their right to protect their residents and governments from unnecessary adverse effects to the community and unnecessary liability due to the acts of the applicants in construction, operation and repair of the facilities maintained on or near local government property.

F. Judicial Review of Wireless Telecommunications Ordinances

This summer, the 9th Circuit of the United States Court of Appeals addressed a Wireless Telecommunications Ordinance enacted by San Diego County that imposed substantive and procedural requirements for wireless facilities (the "San Diego Ordinance")[21] similar to the Wireless Ordinance enacted by the Town of Cutler Bay and ordinances adopted by the other Florida Cities. The San Diego Ordinance prohibits non-camouflaged poles in residential and rural zones, imposed certain height and setback restrictions in residential zones, imposed design standards related to aesthetics, and required hearings before the zoning board and a finding by the board that "the location, size, design and operating characteristics of the proposed use would be compatible with adjacent uses, residents, buildings, or structures," of the community before a permit may be issued. In determining compatibility with the neighborhood, the San Diego Ordinance requires the board to consider the: (1) harmony in scale, bulk coverage and density;

[21] *Sprint Telephony PCS, L.P. v. County of San Diego*, 08 Cal. Daily Op. Serv. 12,025 (9th Cir. 2008).

(2) the availability of public facilities, services and utilities; (3) the harmful effect upon the desirable neighborhood character; (4) The generation of traffic and the capacity and physical character of the surrounding streets; (5) the suitability of the site for the type and intensity of use or development which is proposed; and (6) any other relevant impact of proposed use.[22]

Sprint alleged that the San Diego Ordinance violated 47 U.S.C. §253(a), claiming that it "prohibits or has the effect of prohibiting Sprint's ability to provide wireless telecommunications services". The Ninth Circuit rejected Sprint's claim and found "no difficulty concluding"[23] that the San Diego Ordinance did not effectively prohibit the provision of wireless services. The Court recognized that the San Diego Ordinance imposed "reasonable and responsible conditions for the construction of wireless facilities, not an effective prohibition" and therefore concluded that the Communications Act did not preempt the San Diego Ordinance. Additionally, the Court recognized that the Communications Act already provides an expedited judicial review process in state or federal court.

The wireless ordinances enacted in Florida Cities impose similar standards as the San Diego Ordinance. Clearly, Cutler Bay's Wireless Ordinance, as outlined above, does not effectively prohibit the provision of wireless services. Moreover, wireless providers have the right to challenge a zoning board's action, or lack of action, in a court of competent justice on an expedited basis. The Federal Courts have recognized such local requirements as "reasonable and responsible conditions for the construction of wireless facilities, not an effective prohibition." Therefore, the CTIA proposed pre-emption of Florida law or municipal ordinance is undoubtedly unnecessary and excessive, and interferes with local and state governmental authority and operations.

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[22] *Id.*
[23] *Id.*

III. THE COMMISSION SHOULD NOT RESTRICT A LOCAL ZONING AUTHORITY'S DUTY TO ACT IN THE BEST INTERESTS OF THE CITIZENS AND LOCAL COMMUNITY.

A. State and Local Authority.

In Florida, a local government may adopt its own legislation in the form of ordinances for placement of towers and antennas within their jurisdictions. An ordinance is a law which has been created and adopted by the local governing body. Pursuant to § 166.041(1)(a), Fla. Stat., the term "Ordinance" is defined, as follows:

> *Ordinance* means an official legislative action of a governing body, which action is a regulation of a general and permanent nature and enforceable as a local law.

A municipal ordinance is entitled to the same level of respect and deference as an act adopted by the state legislature. The real authority that is bestowed upon municipal ordinances pursuant to the Florida constitutional home rule powers, which are enjoyed by municipalities, is codified in §166.021(3), Fla. Stat., which provides, as follows:

> The Legislature recognizes that pursuant to the grant of power set forth in Section 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except . . . (exceptions omitted).

Accordingly, subject to the exceptions enumerated in §166.021(3), municipal ordinances are recognized to have the same power, authority, and dignity as State legislation has.

B. Public Safety and Health.

The Florida Cities and many other local governments in coastal regions are constantly threatened by hurricanes, windstorms, thunderstorms, floods, and tornadoes. As a matter of public safety and health, it is important that the Florida Cities be responsible for processing wireless applications to properly prepare for these natural disasters and other emergencies.

Dating back to the obliteration of the City of Homestead by Hurricane Andrew in 1992, several of the Florida Cities had the unique misfortune of being hit by multiple hurricanes that caused significant damage and destruction. In 2004, Hurricanes Charley, Frances, Ivan and Jeanne caused substantial damage to Florida homes. Additionally, in 2005, many Floridians were without power for more than a month in the aftermath of Hurricanes Katrina, Rita and Wilma. Floridians have suffered through torrential rain storms, sustained windspeeds in excess of 150 mph, and temporary relocation for residents residing in mandatory evacuation areas. It is important that the Florida Cities maintain their ability to eliminate interference between emergency rescue agencies, adopt appropriate preparation and response plans for hurricanes, provide necessary emergency services to employees and residents, and that they have the resources and authority to facilitate recovery efforts for the safety and welfare of employees and residents.

Even prior to the anticipated impact of a hurricane, the Florida Cities coordinate their hurricane preparation plans with wireless providers. To facilitate this coordination, many of the Florida Cities negotiate with wireless providers to ensure that procedures are in place for a proper response and recovery effort. In the event of a severe wind event, tower facilities can become a projectiles posing a dangerous threat to both life and property. To address this concern, in lease agreements between Sprint/Nextel and both the City of Homestead and the City of Miramar, Sprint/Nextel willingly agreed to lower a temporary tower facility in the event of an approaching hurricane or sever weather conditions.

Another factor that is addressed through the application review process is the evaluation of appropriate backup power, including generator and/or battery capacity, on municipal property. Many communications towers within the Florida Cities do not have the necessary generators or

antennas that are crucial in effectively responding to extreme weather conditions and their devastating effects. It is important to address emergency power for the operation wireless services at the local level. Additionally, the Florida Cities review applications for compliance with the Florida Building Code that has been updated so that wireless facilities can withstand hurricanes force winds so that exposures to unreasonable hazards during a storm are minimized. Not all state building codes are the same, and, consequently, local authorities responsible for enforcing building codes will have different standards and requirements in processing wireless facility applications. Following hurricanes and other poor weather conditions, the Florida Cities are the entities responsible for removing debris and protecting citizens, but still assist incumbent wireless providers with efforts to restore service. Only a local government has the local knowledge, resources and ability to create responsible placement restrictions on towers and antennas needed to facilitate effective disaster preparation, emergency services, and restoration efforts for the safety of residents and the community.

The Florida Cities' wireless regulations are essential for disaster preparation and restoration efforts. If the Commission removes or alters such authority, or limits local governments ability to properly analyze a siting application, such action could have the unintended consequence of impairing the ability of Florida Cities to provide the necessary response for residents before, during, and after hurricanes and other emergencies. The Commission does not have the capacity to act as a forum to hear complaints arising out of such events. Local government's front–line responsibility would be thwarted if the Commission decided to orchestrate, or regulate, a review process that affects preparation for and recovery from weather disasters impacting the Florida Cities.

C. Protection of Neighborhood Character

CTIA's request to preempt local and state authority over wireless siting would diminish local zoning authority, and, consequently, jeopardizes the character of neighborhoods within the Florida Cities. The Florida Cities, and similarly situated entities, have expended large amounts of time and resources to develop equitable and sensible zoning codes that protect the present and future interests of their residents and communities. The Communications Act recognizes local government's right to do so. Under the Communications Act, aesthetic concerns may be a valid basis for a zoning board's denial of a permit to construct. "The five limitations upon local government authority with respect to wireless telecommunications facilities, in the Telecommunications Act of 1996, do not state or imply that the Act prevents municipalities from exercising their traditional prerogative to restrict and control development based upon aesthetic considerations, so long as those judgments do not mask, for example, a de facto prohibition of personal wireless services."[24] Further, "nothing in the Telecommunications Act forbids local authorities from applying general and nondiscriminatory standards derived from their zoning codes, and ... aesthetic harmony is a prominent goal underlying almost every such code."[25] Moreover, Florida Law allows a local government to exclude the placement of wireless facilities in residential areas or residential zoning districts, but only in a manner that does not constitute an actual or effective prohibition of the provider's service in that residential area or zoning district.[26] If the residential area cannot reasonably be served, the municipality or county and the provider must work together to find a suitable location to provide the provider's service to the

[24] Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51 (1st Cir. 2001)
[25] Aegerter v. City of Delafield, 174 F.3d 886, 891 (7th Cir. 1999).
[26] *See* Section 365.172 (12)(b)(3)

residential area.[27] This procedure provides enough time to ensure that local governments, staff and residents have an opportunity to provide input.

The Florida Cities have substantial social and economic interests in protecting their local residents' quality of life and the local real estate, tourism and commercial markets. The Florida Real Estate and Tourism markets are crucial to our local and state economy and local zoning authority is a critical tool that local governments utilize to ensure that these markets are protected. The areas governed by the Florida Cities include miles of pristine beachfront, islands connected to the mainland by bridges, considerable historic and environmental preservation areas, and dynamic mixed-use and smart growth elements. Each of the Florida Cities has unique characteristics that must be respected and preserved by the local zoning authority. For example, the Village of Bal Harbour is home to luxurious oceanfront resorts and residences and the Bal Harbour Shops, recognized as one of the most prestigious and desirable shopping destinations in the Country. Directly to the west sits the Town of Bay Harbor Islands that consists of two distinct islands. The west island contains exclusively single family homes and the east island contains a business district and multi-family housing. Both areas have clear views of Biscayne Bay. The City of Hollywood is home to the Hollywood Beach Broadwalk, a more than 2 mile long, brick lined pedestrian promenade that is recognized as one of America's top ten nostalgic promenades by USA Today. Further, the City of Sunrise, the City of Miramar, and the City of Weston all share a western border with the Everglades, a landmark for Florida wildlife preservation. On the western border of the City of Homestead are the vast mangrove forests and watery sawgrass plains of Everglades National Park, a subtropical wilderness that shelters alligator and ibis, eagle and manatee. This year, Money Magazine ranked the City of Weston

[27] *Id.*

and the City of Miramar among the 100 Best Places to Live in America.[28] These communities have worked long and hard throughout their histories to protect their neighborhoods. Local government authority over wireless siting is necessary to ensure that providers do not take actions that diminish the character and value of communities.

D. Effect On Housing Market and Residential Property Values

The Florida housing market has a crucial impact on the economic and social behavior of citizens and residents within Florida communities. Currently, Florida is experiencing a housing bust like never before in it's history. The last thing residential communities need is additional inappropriately placed wireless sitings that further depress the value of their properties. It is not surprising that Federal courts have routinely upheld the denials of applications to construct wireless towers where the decisions of local entities were in writing and based on evidence that the tower would diminish property values, reduce the ability of property owners in the vicinity of the proposed tower to enjoy their property, or damage the scenic qualities of the proposed location[29]. Local governments should retain the right to ensure that the least intrusive means are used in the siting process.

CONCLUSION

The Commission does not have the authority to issue the declaratory ruling requested by CTIA because it would be contrary to Congress's expressed intentions and diminish the well established authority of local governments. The current process for addressing land use applications protects the rights of citizens to govern themselves and ensure the appropriate development of the community is properly balanced with the interests of all applicants and residents. The existing system works well. There is no evidence to suggest that the Commission

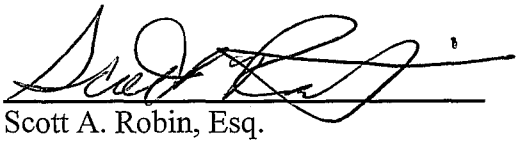
[28] Money Magazine's" Best Places to Live 2008" http://money.cnn.com/magazines/moneymag/bplive/2008/
[29] USCOC of Greater Iowa, Inc. V. Zoning Bd. of Adjustment, 465 F.3d 817 (8th Cir. 2006)

should grant a special waiver of state and local law to the wireless industry. Any perceived difficulties experienced by wireless providers are adequately addressed through each individual community and the courts. Federal agency intrusion is neither warranted, nor authorized.

The Florida Cities oppose any action by the Commission that adversely impacts the welfare of their communities, and ultimately eliminates any oversight over placement of wireless facilities and the protection currently afforded to persons residing within the Florida Cities. Federal and Florida laws provide the necessary regulations for placement of wireless facilities. Accordingly, the Florida Cities respectfully request that the Commission deny CTIA's Petition.

Respectfully submitted,

Village of Bal Harbour, Florida
Town of Bay Harbor Islands, Florida
Town of Cutler Bay, Florida
City of Hollywood, Florida
City of Homestead, Florida
City of Miramar, Florida
City of Sunrise, Florida
City of Weston, Florida



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